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9 **UNITED STATES BANKRUPTCY COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
11 **SAN JOSE DIVISION**

12 In re:)	Chapter 11
)	
13)	Cases Jointly Administered
)	
14 COMMUNITY TOWERS I, LLC,)	Case No. 11-58944-SLJ-11
A Delaware Limited Liability Company,)	
15 Employer Tax I.D. No. 75-2456729,)	
)	
16 COMMUNITY TOWERS II, LLC,)	Case No. 11-58945-SLJ-11
A Delaware Limited Liability Company,)	
17 Employer Tax I.D. No. 75-2560662,)	
)	
18 COMMUNITY TOWERS III, LLC,)	Case No. 11-58948-SLJ-11
A Delaware Limited Liability Company,)	
19 Employer Tax I.D. No. 32-0065635,)	
)	
20 COMMUNITY TOWERS IV, LLC,)	Case No. 11-58949-SLJ-11
A Delaware Limited Liability Company,)	
21 Employer Tax I.D. No. 77-0379075,)	
)	Date: October 15 - 16, 2012
)	Time: 9:00 a.m.
22 Debtor(s).)	Place: United States Bankruptcy Court
)	280 S. First St., Room 3099
23 111 W. Saint John Street, Suite 705)	San Jose, CA 95113
24 San Jose, California 95113)	Judge: Honorable Stephen L. Johnson

25 **DEBTORS' TRIAL BRIEF AND RESPONSE TO CIBC'S OBJECTIONS TO**
26 **CONFIRMATION OF THE DEBTORS' JOINT PLAN**
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1 DEBTOR'S TRIAL BRIEF AND RESPONSE TO CIBC'S
OBJECTIONS TO CONFIRMATION OF THE DEBTORS' JOINT
PLAN

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I. INTRODUCTION

Pursuant to the Court's THIRD ORDER APPROVING DISCLOSURE STATEMENT FOR DEBTORS' JOINT PLAN OF REORGANIZATION (DATED MARCH 27, 2012) AND FIXING TIME FOR FILING ACCEPTANCES OR REJECTIONS OF PLAN AND OBJECTIONS TO CONFIRMATION OF PLAN, COMBINED WITH NOTICE THEREOF (the "Scheduling Order"), Community Towers I, LLC, Community Towers II, LLC, Community Towers III, LLC, and Community Towers IV, LLC (the "Debtors"), the debtors and debtors in possession herein, hereby submit hereby their trial brief in support of DEBTORS' JOINT PLAN OF REORGANIZATION (DATED MARCH 27, 2012) (the "March 27 Plan") and, as modified by the FIRST MODIFICATION TO DEBTORS' JOINT PLAN OF REORGANIZATION (DATED MARCH 27, 2012) filed on August 31, 2012, the "Plan").¹

The Trial Brief also is filed in response to CIBC's OBJECTIONS TO CONFIRMATION OF THE DEBTORS' JOINT PLAN (the "Objection") filed by CIBC, Inc. ("CIBC") on May 21, 2012 in opposition to the March 27 Plan. In addition to responding to the Objection, this Trial Brief supports the Debtors' STATEMENT RE REQUIREMENTS OF 11 U.S.C. § 1129(A) AND (B) AND CHECKLIST FOR CONFIRMATION HEARING (the "Statement") filed concurrently herewith. Pursuant to the Scheduling Order, the Court will hold a hearing on the Confirmation of the Plan and the Objection thereto on October 15 and 16, 2012.

This is a single asset real estate case involving the two building, 305,000 square foot office complex located at 111 West Saint John Street and 111 North Market Street, San Jose, California (the "Property") purchased by the Debtors in June of 2006 for \$41,500,000. The Debtors invested \$12,000,000 from the sale or exchange of properties and borrowed \$33,500,000 to purchase and fund improvements to the Property from CIBC pursuant to an interest-only promissory note (the "Note") secured by a deed of trust (the "Deed of Trust") at a variable rate of 2% above the London Interbank Offered Rate ("LIBOR") with a floor of 7% and a maturity date of June 10, 2009. The Property had only a 65% occupancy rate at the time of acquisition. The Debtors' plan was to improve the condition of the Property and lease it to 90% occupancy at which both CIBC and the

¹ All capitalized terms used but not separately defined herein shall have the meaning ascribed to them in the Plan. A term that is not defined herein or in the Plan but is used in the Bankruptcy Code or the Bankruptcy Rules shall have the meaning ascribed to such term in the Bankruptcy Code or the Bankruptcy Rules.

1 Debtors believed would achieve stabilization. Both the Debtors and CIBC expected and anticipated
2 that the loan would be refinanced through CIBC at stabilization with a ten-year fixed rate loan.

3 Based on this expectation, the Debtors' principals invested almost \$10,000,000 to fund
4 capital expense, tenant improvements and leasing commissions and successfully brought the
5 Property to stabilization by February 2009. However, the 2008-2009 sub-prime mortgage crisis
6 precipitated the worst recession since the Great Depression and CIBC did not extend permanent
7 financing. The Debtors were unable to refinance the Loan with other lenders and obtained an
8 extension of the Note only on extremely onerous terms, including, among other terms, a monthly
9 tenant improvement reserve payment of over \$100,000 from the Property's cash flow. The Note and
10 Deed of Trust were amended in accordance with the terms of the extension (the "Extension").
11 Because CIBC did not make disbursements from this reserve, the Debtors were unable to make the
12 reserve payment and fund other vendor expenses and ceased making the reserve payment in
13 November, 2009.

14 The Plan provides for issuance of an interest-only promissory note with a five-year term at a
15 fixed rate of 6%. Both the Debtors and CIBC have retained experts to opine on the appropriateness
16 of the interest rate and feasibility of the Plan. For purposes of Confirmation, both experts have based
17 their expert reports on an assumed value of \$41,000,000 for the Property and a secured Claim of
18 approximately \$38,000,000 representing principal and accrued non-default interest as of October 1,
19 2012.² The Debtors anticipate that they will be filing declarations in lieu of direct testimony as
20 directed by the Scheduling Order for the following witnesses:

21 ² CIBC has indicated that it will claim that its secured Claim is over \$44,000,000 based on asserted default
22 interest and late fees totaling over \$6,000,000. Concurrently with this Trial Brief, the Debtors have filed their objection
23 to CIBC's Claim. CIBC is not entitled to recovery of default interest under California law as an unenforceable liquidated
24 damages provision and because its conduct forced the very defaults on which its Claim is based. This Objection is
25 without prejudice to any of the Debtors' rights to raise affirmative claims against CIBC which may further reduce or
26 eliminate liability of the Debtors under the loan. In response to the Debtors' requests for production of documents,
27 CIBC produced over 27,000 pages of documents; however, 80% consisted of cumulative reports on real estate portfolios,
28 documents unrelated to the Debtors and/or the Property, blank pages, etc. and did not include certain relevant documents
which the Debtors, on information and belief, are in CIBC's possession. Thus, CIBC's production was a classic
"document dump" forcing the Debtors to review 27,000 pages at a time when they were preparing for trial, and even then
is demonstrably incomplete. On September 27 and 29, CIBC produced another 45,000 pages of documents consisting of
over 1,400 documents of which 743 documents, consisting of over 9,000 pages were not previously produced or seen by
Debtors' counsel. The Debtors are unable to review this additional production and prepare for trial on the confirmation
of their Plan now scheduled for October 15 and 16.

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1 1. John Feece. Mr. Feece is a principal of the Debtors and will provide a declaration
2 regarding the circumstances giving rise to the filing of these Cases, the terms and feasibility of the
3 Plan, the value of the Property, and related matters.

4 2. Tracy Nakagawa. Ms Nakagawa is the accounting manager of the Debtors and will,
5 among other things, provide testimony regarding the preparation of the projections.

6 3. Eric Mogensen. Mr. Mogensen is special counsel to the Debtors and will provide
7 testimony regarding the circumstances leading to the issuance of the Note, the execution of the
8 Extension and the filing of the Bankruptcy Cases.

9 4. Doug Feece. Mr. Feece is an employee of the Debtors' management company and
10 the principal of Feece Realty which acts as leasing agent for the Debtors. He will testify as to the
11 preparation and reasonableness of the projections.

12 5. Donn Byrne. Mr. Byrne is a licensed real estate appraiser and a Member of the
13 Appraisal Institute (MAI). He prepared and certified an appraisal of the Property and opined that as
14 of October 31, 2011, the Property had a fair market value of \$41,000,000. He will provide a
15 declaration confirming that based on his review of the appraisal and his knowledge of comparable
16 buildings, sales and leases figures since his appraisal, the recent state of the office market in
17 downtown San Jose, and the leases which have transacted in the Property since his last appraisal, the
18 market value of the Property is not less than \$41,000,000 as of October 2012.

19 6. Enrique Rodriguez. Mr. Rodriguez is founder and principal of Rodriguez and
20 Associates Advisory Group, a Los Angeles based consulting firm that, for the past twenty years, has
21 provided services to the legal, financial and real estate development communities, as well as not for
22 profit and public sector organizations. He will provide expert testimony regarding the current
23 market conditions for financing of Class B office buildings in the Downtown San Jose market; an
24 appropriate rate of interest for CIBC's secured loan to the Debtors; and the feasibility of the debtor's
25 proposed plan and the fair and equitable treatment of secured Creditors under 11 U.S.C. §1129.

26 In addition, the Debtors have taken the deposition of former CIBC employee Kedist Tsadik
27 and anticipate introducing her testimony and certain internal documents provided by CIBC in this

1 case through discovery through the submission of excerpts of her testimony. On October 4, 2012,
2 the Debtors took the deposition of Lindsay Gordon, designated by CIBC as its Rule 30(b)(6) witness
3 pursuant to stipulation. The Debtors may introduce excerpts of this deposition as well.

4 II. THE ISSUES

5 In opposition to Confirmation of the Plan, CIBC's Objection raises four issues³: (a) the Plan
6 is not feasible in violation of section 1129(a)(11) of the Bankruptcy Code; (b) the Plan is not in the
7 best interests of Creditors in violation of section 1129(a)(7) of the Bankruptcy Code; (c) the Plan
8 does not comply with the applicable provisions of the Bankruptcy Code as required by section
9 1129(a)(1) of the Bankruptcy Code because it modifies the obligations of third parties under a
10 guaranty; and (d) the Plan is not fair and equitable in violation of section 1129(b)(1) of the
11 Bankruptcy Code to the extent the Plan sets an interest rate of 8.25% on the Note.

12 CIBC's objections are without merit. The Plan is feasible, is in the best interest of the
13 Creditors, does not modify any third-party obligations and is fair and equitable. CIBC made the
14 original loan in 2006 at a time when the Property was only 65% occupied, at 7% interest for three
15 years based on the Debtor's plan to make capital improvements and improve occupancy rates to
16 achieve stabilization. The Debtors were indeed successful in their efforts, fulfilling the projections
17 and achieving stabilization of the Property at a 90% occupancy rate, investing nearly \$20 million of
18 their own funds to acquire and improve the Property. In so doing, the Debtors elevated the Property
19 from a near Class C property to the top of Class B properties, substantially outperforming the market
20 and enhancing the value of CIBC's collateral.

21 Instead of extending a permanent loan due to the collapse of the real estate market and
22 banking industry as both parties had anticipated when the loan was initially made, CIBC instead now
23 wanted the Debtors to sell the Property to repay the Note and imposed onerous terms and conditions
24 designed to force the Debtors to sell as soon as possible in an extremely down market at a
25 considerable loss. Due to the recession, occupancy rates decreased to about 80%. During these

26 _____
27 ³ The Debtors anticipate that CIBC will file a brief prior to the confirmation hearing supplementing its
objections, to which the Debtors will respond prior to the hearing in accordance with the Scheduling Order.

1 Cases, the Debtors have been able to achieve a 90% occupancy rate again as of the date of the Trial
2 in a market that while improving has continued to experience negative absorption rates. The Debtors
3 have demonstrated an ability to meet and fulfill a plan and indeed the Property is in a much better
4 position now than it was in 2006. The proposed interest rate is appropriate. For the reasons set forth
5 below, the Debtors submit that the Court should overrule CIBC's objections and confirm the Plan.

6 **III. RELEVANT FACTS**

7 **A. Background**

8 **1. The Property**

9 1. In June of 2006, the Debtors purchased the two building, 305,000 square foot office
10 complex located at 111 West Saint John Street and 111 North Market Street, San Jose, California
11 (the "Property") for \$41,500,000. The Property is located in the central part of downtown San Jose,
12 surrounded by a mix of office, retail and residential properties and reflects an increasingly desirable
13 area for business and residential locations. The Property is within walking distance of restaurants,
14 hotels, public parks and open space, the San Jose Convention Center, San Jose State University, San
15 Jose City Hall and the Santa Clara County Superior Court. The Property also is easily accessible to
16 freeways and public transportation. The Property also enjoys its position in the downtown San Jose
17 market which attracts businesses seeking more cost-effective rental rates than those offered in the
18 costly San Francisco and Palo Alto area markets.

19 2. John and Rosalie Feece are the ultimate principals of the Debtors. Beginning in 1973,
20 they made numerous investments in residential rental units. Beginning in 1990 and through the
21 present, John and Rosalie have been actively and extensively involved in real estate investment,
22 operations and management, beginning with apartments and then moving on to commercial real
23 estate.

24 3. The office towers are vintage buildings constructed in the 1960's, and the Debtors
25 have invested substantial effort and resources into renovations of its exterior and interior over the
26 past six years. The Property is now at the very top of its class in terms of quality, and therefore has
27 attracted, and will continue to attract and retain, tenants.

1 **2. Management of the Property**

2 4. Community Towers Management, LLC, a California limited liability company
3 (“CTM”), is the management company for the Property. John and Rosalie Feece are CTM’s sole
4 members. CTM employs 5 employees through its affiliate, Sierra Management First Street, LLC
5 (“Sierra”), which is also wholly owned by John and Rosalie Feece. As the Property’s management
6 company, CTM collects rents and pays expenses on behalf of the Debtors and manages the
7 Property’s day-to-day operations.

8 5. John Feece is responsible for all day-to-day operations of the Subject Property,
9 including the supervision of CTM and Sierra, leasing activities, supervision of real estate brokers,
10 coordination of construction and maintenance activities, coordination of vendors required to keep the
11 buildings operating smoothly, negotiations with tenants and third party vendors, coordinating with
12 tenants to ensure their needs are being met, and other activities necessary to keep the Subject
13 Property running in a professional and first class manner. Rosalie Feece is responsible for all
14 accounting and finance functions associated with the Debtors and CTM, and she also assists in day-
15 to-day operations and projects as needed.

16 **3. The Initial Loan**

17 6. To facilitate the transaction, the Debtors borrowed \$33,500,000⁴ from CIBC, a
18 Chicago, Illinois based subsidiary of Canadian Imperial Bank of Commerce. The Debtors invested
19 another \$12,000,000 in the sale or exchange of prior real estate property held by John Feece and
20 Rosalie Feece or affiliated entities to complete the acquisition of the Property.⁵ CIBC immediately
21 disbursed \$29,500,000 to finance the acquisition and held back \$4,000,000 to fund capital
22 expenditures and tenant improvements. The loan was evidenced by the Note, which provided for an
23 initial three-year term and required payments of interest only based on LIBOR plus 2% with a 7%
24 floor.

25 7. The parties anticipated that if the Debtors completed certain improvements and leased

26 ⁴ The NOTICE OF DEFAULT AND ELECTION TO SELL UNDER DEED OF TRUST recorded by CIBC on September 1,
2011 alleges an amount due of \$38,905,806 as of August 31, 2011.

27 ⁵ CIBC’s appraisal indicated that the Property had a stabilized market value of \$50,000,000 as of April 22,
28 2006.

1 the Property sufficiently to a certain capacity, the loan would be converted into a standard 10-year
2 fixed rate loan issued by CIBC. Internal documents produced by CIBC confirm that it
3 acknowledged that “the loan is expected to be refinanced through CIBC’s permanent fixed rate loan
4 program” and “it is anticipated that the Borrower will refinance this Loan through CIBC’s
5 permanent loan program once stabilized.”

6 8. In reliance on this understanding, the Debtors entered into the loan. Between 2006-
7 2009, John and Rosalie Feece loaned almost \$10,000,000 to the Debtors from funds they had
8 received from the sale of certain properties and from proceeds of a line of credit from Focus Bank
9 which the Debtors used to make substantial improvements to the Property and fund tenant
10 improvements, of which approximately \$6,700,000 remains outstanding. As a result, the Debtors
11 improved and leased a significant amount of the vacant units of the Property, ultimately achieving
12 and maintaining an occupancy rate that was well above that of competing properties in the area. In
13 fact, during this period, the Debtors raised the occupancy rate of the Property from 65% to
14 approximately 90%. Internal CIBC documents confirm that CIBC was “comfortable” with the
15 Debtors’ ability to reach its projections, and CIBC’s own internal report dated February 18, 2009
16 concluded that “the borrower has successfully executed its plan to reach stabilization.”

17 4. The Extension of the Loan

18 9. With the onset of the financial crisis of 2008 - 2009, the lending market for
19 commercial loans evaporated. As the maturity date of the Note approached, the Debtors requested
20 that CIBC issue a permanent fixed rate loan. It became apparent that despite its promise of
21 permanent financing if the Property reached stabilization, CIBC was not going to offer permanent
22 financing. Instead, CIBC now wanted the Debtors to sell the Property as soon as possible and
23 embarked on a course of dealing designed to coerce the Debtors to sell the Property by imposing
24 such onerous terms on an extension to extract and control all excess cash flow after debt service, to
25 force the Debtors to sell the Property at a deep discount in a failing economy. It offered only a two-
26 year extension subject to certain onerous and non-negotiable terms. Among other things, CIBC
27 increased the interest rate to LIBOR + 4%, retained the 7% floor, imposed an arbitrary and

1 capricious “commission/tenant improvement” reserve (the “TI/LC Reserve”) in the amount of
2 \$104,043 per month, imposed a \$335,000 “extension fee” payable in full by July 31, 2009, and
3 increased the “deferred commitment fee” from \$251,250 to \$1,005,000, which would be reduced to
4 \$335,000 in the event the loan was paid in full prior to December 10, 2009.⁶

5 10. Internal documents produced by CIBC in these Bankruptcy Cases confirm that CIBC
6 was grossly overreaching in its demands. According to such documents, CIBC’s underwriters
7 recommended to CIBC’s credit committee a proposal that would, among other things, establish a
8 TI/LC Reserve of \$59,043 per month and a monthly payment against the principal amount of
9 \$45,000 to be paid from excess cash.⁷

10 11. Even before the loan extension closed, CIBC knew that the Property’s cash flow
11 would not support the TI/LC Reserve requirements. Unknown to the Debtors, on June 8, 2009, just
12 prior to the closing of the Amendment, CIBC’s underwriters recommended that the TI/LC Reserve
13 requirement be decreased to \$80,000 per month, citing negative cash flow at then-current occupancy
14 rates if the \$104,000 requirement was imposed. Although the Debtors had achieved stabilization,
15 CIBC refused to extend permanent financing. Instead, it is clear that CIBC wanted the Debtors to
16 sell the Property and imposed these onerous terms to convert what was a successful, performing loan
17 generating substantial cash flow into a non-performing loan to coerce the Debtors to sell at a time
18 when the real estate market was extremely weak.

19 5. The 2009 Financial Crisis

20 12. The Debtors immediately felt the burdens of the additional requirements imposed by
21 CIBC. At that time, the failing economy rendered some of the Property’s tenants unable to meet the
22 terms of their leases, causing revenue to drop and occupancy to decrease to approximately 80%.
23 Some tenants started to request assistance while others completely shut down their businesses. The
24 Debtors made the \$335,000 “extension fee” payments as well as the first three payments into the

25 ⁶ The increase of the commitment fee to \$1,005,000 and the “reduction” was presumably to “incentivize” the
26 Debtors into selling the Property before the end of 2009.

27 ⁷ Subsequently, in May 2009, another CIBC senior executive apparently suggested adding the \$45,000 principal
28 pay down requirement to the TI/LC Reserve requirement, resulting in the monthly \$104,043 TI/LC Reserve requirement
which CIBC eventually imposed on the Debtors. This TI/LC Reserve requirement thus was not based on any analysis
of what would be reasonably required.

1 TI/LC Reserve account, but because CIBC would not promptly issue reimbursements from the
2 TI/LC Reserve (or refused because certain requests did not meet all technical requirements for
3 disbursement), accounts payable to vendors, contractors and real estate agents went unpaid. Since
4 those vendors, contractors and real estate agents were essential to keep the business running
5 smoothly, the Debtors ceased making payments to the TI/LC Reserve in October 2009 and instead
6 used those funds to pay off the accounts payable which had fallen behind.

7 13. The Debtors attempted to engage CIBC in negotiations for a long-term resolution.
8 Initially, CIBC simply refused to engage in good faith negotiations and insisted on a full and
9 unconditional release from all claims as a condition to even discuss a resolution. Eventually, after
10 the parties executed a pre-negotiation letter which did not contain such a release, the parties
11 proceeded in discussions and the Debtors tendered, and CIBC accepted, payments and application of
12 TI/LC Reserve as paying down what CIBC represented to be the outstanding unpaid interest balance
13 on the loan as of October 2010. Negotiations continued through August 2011. CIBC did not declare
14 any default and did not make any demand for payment of default interest or late charges.

15 14. By April 2011, the parties reached an agreement in principle regarding a further
16 extension. Among the deal points was a term which would allow John and Rosalie Feece to make a
17 paydown of the line of credit from Focus Bank from the cash flow of the Property. While the deal
18 was being documented, the Feecees made a payment to Focus Bank. CIBC had been kept informed
19 of the progress of the status of the Focus Bank negotiations, but apparently a senior CIBC executive
20 became angered by the payment.

21 15. As a result, in August 2011, CIBC declared a default, recorded a notice of default (the
22 “NOD”), filed a complaint for judicial foreclosure and moved for the appointment of a receiver,
23 precipitating the filing of the Bankruptcy Cases. Prior to such time, CIBC had not declared any
24 default, and all of its demands to the Debtors were limited to payment of contractual, non-default
25 interest. Indeed, even up to the commencement of the Bankruptcy Cases, CIBC issued invoices to
26 the Debtors setting forth the outstanding balance of the loan, none of which included accrued or

27 ///

1 calculations of default interest or late fees. The Debtors filed their Voluntary Petitions on September
2 26, 2011.

3 IV. THE PLAN

4 16. The Plan accords treatment to CIBC's Allowed Claim under Class 2 as follows⁸:

5 5.1 Class 2 (Allowed CIBC Claim).

6 Pursuant to section 1129(b)(2)(A)(i), CIBC shall retain all
7 liens, security interests and other encumbrances affecting property of
8 the Debtors and the Reorganized Debtors granted in favor of CIBC
9 prior to the Effective Date to the extent of the Allowed Secured Claim
10 of CIBC.

11 Commencing on the first day of the first calendar month
12 following the Effective Date and continuing for five (5) years
13 following the Effective Date, CIBC will receive monthly payments of
14 interest only on its Allowed Secured Claim at the fixed rate of six
15 percent (6%) per annum.

16 CIBC will be paid the principal of its Allowed Secured Claim
17 no later than five (5) years following the Effective Date.

18 CIBC's Allowed Secured Claim may be paid in full at any time
19 without penalty, and will be paid in all events no later than five (5)
20 years following the Effective Date. The Subject Property may be
21 transferred subject to the Allowed Secured Claim of CIBC. The
22 foregoing is in full and final satisfaction of all Class 2 Claims.

23 17. With respect to other Creditors, the Plan proposes to pay all Allowed Claims in full
24 and General Unsecured Creditors, with the exception of the unsecured Claims of John Feece and
25 Rosalie Feece, shall receive equal monthly Distributions over twelve months.

26 18. The Plan accords treatment to the Allowed General Unsecured Claims of John and
27 Rosalie Feece as follows⁹:

28 ⁸ The March 27 Plan provided for CIBC to retain all liens, security interests and other encumbrances to the
extent of the its Allowed Secured Claim and for payment of CIBC's Allowed Secured Claim over ten (10) years with
interest at the Prime Rate or such other rate as may be determined by the Court, adjusted annually and subject to a 3
1/4% floor, as follows: (i) for the first five (5) years following the Effective Date, CIBC will receive monthly payments
of interest only, commencing on the first day of the first calendar month following the Effective Date, and (ii) for years 6
through 10 following the Effective Date, CIBC will receive monthly payments of principal and interest based on a thirty
(30) year amortization schedule. In addition, the March 27 Plan provided that CIBC's Allowed Secured Claim may be
paid in full at any time without penalty, and no later than ten (10) years following the Effective Date.

⁹ The March 27 Plan provided for John Feece and Rosalie Feece to receive payment on account of their
Allowed General Unsecured Claims over a ten-year period with interest at the prime rate quoted by Bank of America,
N.A, adjusted annually and subject to a 3 1/4% floor.

1 5.4 Class 7 (General Unsecured Claims of John and Rosalie
2 Feece).

3 Class 7 consists of the Allowed General Unsecured Claims of
4 John and Rosalie Feece.

5 Commencing on the first day of the first calendar month
6 following the Effective Date and continuing for five (5) years
7 following the Effective Date, John and Rosalie Feece will receive
8 monthly payments of interest only on their Allowed General
9 Unsecured Claims at the fixed rate of six percent (6%) per annum.
10 John and Rosalie Feece will be paid the principal of their Allowed
11 General Unsecured Claims no later than five (5) years following the
12 Effective Date.

13 If the Debtors experience a cash shortfall in any given month
14 that prevents them from making all payments pursuant to the Plan, the
15 payment due to the Class 7 Creditors shall be reduced by the amount
16 of the shortfall and deferred, and paid only at such time as the Debtors
17 have sufficient cash to make up the shortfall deferral.

18 The foregoing is in full and final satisfaction of all Class 7
19 Claims.

20 **V. DISCUSSION**

21 **A. The Plan Is Feasible**

22 19. 11 U.S.C. § 1129(a)(11) does not require that a plan is guaranteed to succeed but only
23 that it has a “reasonable probability of success” and is not a “visionary scheme.” *In re Acequia, Inc.*,
24 787 F.2d 1352, 1364 (9th Cir. 1986). “The prospect of financial uncertainty does not defeat plan
25 confirmation on feasibility grounds since a guarantee of the future is not required. The mere
26 potential for failure of the plan is insufficient to disprove feasibility.” *Mutual Life Ins. Co. v.*
27 *Patrician St. Joseph Partners, Ltd. P'ship (In re Patrician St. Joseph Partners Ltd. P'ship)*, 169 B.R.
28 669, 674 (D. Ariz. 1994) (citation omitted).

1 **1. The Debtors' Financial Condition**

2 20. The Debtors have cash on hand, currently in the amount of \$1,047,652.19 as of
3 October 4, 2012, which will be sufficient to pay all Allowed Claims entitled to payment as of the
4 Effective Date.

5 21. The Debtors have filed their MONTHLY OPERATING REPORTS which indicate that over
6 the course of these Bankruptcy Cases, the Debtors have operated at a profit. The Debtors have

1 remained current on administrative expenses aside from certain professional fees which are not
2 permitted to be paid from CIBC's cash collateral. In addition, the Debtors have made adequate
3 protection payments to CIBC pursuant to the Adequate Protection Order since August 1, 2012.

4 22. CIBC's expert has assumed the value of CIBC's Claim to be approximately
5 \$38,000,000. The Debtors' projections show that the Reorganized Debtors can make the Plan
6 payments.

7 **2. The Projections**

8 23. In support of the March 27 Plan, the Debtors prepared and submitted projections
9 attached as Exhibit "B" to the Disclosure Statement. To reflect the developments in the Bankruptcy
10 Cases and economic conditions since the Debtors filed the March 27 Plan and the Disclosure
11 Statement, the Debtors prepared and forwarded updated cash flow projections to their retained
12 expert, Enrique Rodriguez, for his review. These projections were attached as Exhibit "C" to Mr.
13 Rodriguez' report which was produced to CIBC in accordance with the Scheduling Order. Mr.
14 Rodriguez' testimony will include an analysis of these projections and will state, among other things,
15 that due to increased leasing activity and improved leasing market, the Debtors' projections reflect
16 increased anticipated revenues as compared to the projections attached to the Disclosure Statement.
17 They demonstrate that the Debtors will generate sufficient cash flow to fund all payments under the
18 Plan and, furthermore, that the Reorganized Debtors will be adequately capitalized during the term
19 of the Plan.

20 24. CIBC criticizes the Debtors' projections, contending that revenues are overstated and
21 expenses are understated. The projections have been examined by each side's experts who will
22 testify as to their opinions and conclusions regarding feasibility. Because CIBC's expert opinion is
23 based on faulty and outdated data, his testimony should not be given much weight by this Court.

24 **a) The Rental Revenue Projections Are Reasonable**

25 25. Based on the Debtors' recent experience alone, it is apparent that market pricing has
26 increased and the Debtors are able to ask and receive these higher current market rates. The
27 Debtors' expert Enrique Rodriguez will corroborate. While CIBC's expert Richard Ferrell opined in

his report about factors which may affect rental rates negatively, the Debtors have consistently outperformed their competition and the submarket and are well suited to continue. This is to be expected given the aptitude and attention to customer service provided by management and the customer goodwill it has cultivated.

26. CIBC dismisses the Debtors' established history of outperforming generalized market data points and doubts the Debtors' projections for future performance. The fact is that the Debtors are now well-positioned to achieve the revenues reflected in their projections and to execute the Plan.

**b) The Tenant Improvements And Leasing Commission Costs
Projected By The Debtors Are Reasonable**

27. CIBC contends that the Debtors' forecast of its TI and LC expenses lacks credibility, citing the costs of improvements incurred during these Cases. However, Community Towers sought and obtained approval from CIBC to make the subject improvements, consulting with CIBC and responding to questions and comments regarding the recovery of these costs over the terms of the leases. CIBC approved all of these expenditures. While some improvements were costly, they were imperative, and the Debtors initiated them after consultation with and approval from CIBC. Presently, because the Debtors' have addressed almost all features which required improvements, the need for future TIs will be considerably less.

28. Once made, many of these expenditures will not have to be incurred again for a very long time, and certainly not within the time period contemplated by the Plan. Further, it is misleading and inaccurate to attribute less revenue coming into the Property when in fact much of the costs of the improvements have been amortized into the lease rates, resulting in higher than market rental rates which will be received over the terms of the leases.

**c) The Debtors Have Demonstrated Ability To Generate Credible
Projections**

29. CIBC contends that this Court should disregard or give little weight to Debtors projections because they have revised projections during these Bankruptcy Cases. However, the

Debtors in good faith have responded to inquiries from CIBC and have prepared projections each time based on current conditions. Increases in tenant improvement costs have been the result of the Debtors being willing to take advantage of opportunities that have arisen for the Property, which have resulted in increased occupancy rates, considerable enhancements to the value of the Property and hence to CIBC's collateral. These improvements have been done in consultation with CIBC and Debtors should not be penalized by unwarranted assertions regarding their credibility. For example, the Kerio lease required higher than average TI costs due to Kerio's request for a more elaborate build out; however, these higher costs were amortized into an increased rental rate over a 10 year lease term, all of which was approved in advance by CIBC. In fact, in the initial years following the acquisition of the Property, the Debtors consistently performed to projections, to the point where CIBC servicers commented favorably upon the Debtors' performance and indicated that they were "comfortable" with the Debtors' ability to meet their projections.

B. The Plan Is Fair And Equitable

30. Section 1129(b)(2) provides as follows:

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides—

(i) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

1 31. Here, the Plan provides for CIBC to retain all liens, security interests and other
2 encumbrances granted in favor of CIBC prior to the Effective Date to the extent of its Allowed
3 secured Claim, pursuant to section 1129(b)(2)(A)(i). Thus, the Plan needs only to provide deferred
4 cash payments which total the Allowed amount of CIBC's secured Claim.

5 32. As set forth by section 1129(b)(2)(A)(i), in order to determine whether a plan
6 provides deferred cash payments which total the allowed amount of the secured claim, a court must
7 first determine the allowed amount of the claim and second determine the value, as of the plan
8 effective date, of the property to be distributed.¹⁰ *E.g., Wells Fargo Bank N.W. v. Yett (In re Yett)*,
9 306 B.R. 287, 291 (9th Cir. BAP 2004). The latter addresses the principle of the time value of
10 money and therefore requires an examination as to the proposed interest rate. *See Till v. SCS Credit*
11 *Corp.*, 541 U.S. 465, 484-85 (2004) ("*Till*") (applying Section 1325(a)(5)(B)(ii) in the chapter 13
12 context). "Thus, a plan need only propose an interest rate that will compensate a creditor for the fact
13 that had he received the property immediately rather than at a future date, he could have immediately
14 made use of the property." *Id.*

15 1. Applicable Formula For Interest Rate Calculation

16 33. In *Till*, a plurality of the Supreme Court held that courts should treat similar creditors
17 similarly when selecting a cramdown interest rate and should apply an objective economic analysis.
18 *Id.* at 476-77. Specifically, the *Till* plurality adopted a "formula approach" because it "entails a
19 straightforward, familiar, and objective inquiry, and minimizes the need for potentially costly
20 additional evidentiary proceedings." *Id.* at 479. The formula approach uses the national prime rate
21 and adds an appropriate risk adjustment "[b]ecause bankrupt debtors typically pose a greater risk of
22 nonpayment than solvent commercial borrowers." *Id.* Factors for consideration in determining the
23 size of the risk adjustment include "the circumstances of the estate, the nature of the security and the
24 duration and feasibility of the reorganization plan." *Id.* The creditor's circumstances or its prior
25 interactions with the debtor are not considered. *Id.* at 479-80. In addition, the creditor maintains the

26 ¹⁰ As noted above, the Debtors' expert opined that the value of the Property is not less than
27 \$41,000,000 and both sides experts have assumed this valuation in coming to their opinions. CIBC
28 has the burden of proving the value of its secured Claim. It will not be submitting any evidence of
the value of the Property for the purpose of supporting its asserted \$44,000,000 Claim.

1 burden to present evidence to establish the proper risk premium. *See id.* at 484-85. (*See also In re*
2 *Fowler*, 903 F.2d 694, 698 (9th Cir. 1990), which articulates a similar method which starts with a
3 standard measure of risk free lending, such as the Prime Rate or the rate on treasury obligations, and
4 takes into consideration “the risks associated with a given debtor and the security associated with a
5 specific debt.”).

6 34. In adjusting to the base rate, a court may consider a number of factors, including (a)
7 circumstances of the estate, (b) nature of the security, (c) plan duration, and (d) plan feasibility. *Till*
8 541 U.S. 465, at 479. *See also In re Villa Diablo Assocs.*, 156 B.R. 650, 654-55 (Bankr. N.D. Cal.
9 1993) (listing size and term of the loan, whether loan is secured, quality of the security, risk of
10 default, and effect of the confirmation process).

11 35. Here, both sides’ experts adopt *Till*’s formula approach. Accordingly, the Court
12 should apply the formula approach. In their respective reports, both experts have based their
13 opinions on the assumption that the Property is valued at \$41,000,000 and the secured Claim is
14 approximately \$38,000,000. The following discussion further addresses each factor in light of the
15 arguments raised by CIBC and Mr. Ferrell.

16 **a) Circumstances Of The Estate**

17 36. In analyzing this factor, Mr. Rodriguez assigns a .25% downward adjustment, citing
18 the quality of the Debtors’ management and demonstrated commitment to the Property. Mr. Ferrell
19 concedes that the Debtors have performed well in terms of leasing, maintaining and managing the
20 Property. Indeed, the Debtors’ track record of outperforming its competitors and consistently
21 exceeding market averages, as detailed above, speaks for itself. For example, the Debtors’
22 management companies have leased the Property to over 90% occupancy twice in the last six years
23 and the Debtors have maintained levels above 80% since attaining that mark only two years after
24 purchasing the Property in 2006. In comparison, Legacy Civic Towers, one of the Debtors’ main
25 competitors in the area, has failed to reach occupancy above 50% over the last seven years.

26 37. Instead, Mr. Ferrell assigns a 1.0% upward adjustment due to the lack of new cash
27 commitment into the Property. While the Debtors have not infused new cash during the Bankruptcy

1 Cases, their contributions and commitment are unquestionable. The Debtors invested \$12 million
2 and received a \$7 million loan from John and Rosalie Feece to purchase and improve the Property to
3 its current state. These significant contributions, which largely were used to satisfy CIBC's goals for
4 refinancing to a standard fixed rate loan terms, evidence the Debtors' commitment and should not
5 simply be disregarded as Mr. Ferrell has done. In addition, the Debtors' principals, John and Rosalie
6 Feece, have agreed to defer payment on their Class 7 Claims in the event of any cash shortfall which
7 prevents any Distribution under the Plan.

8 **b) Nature Of The Security**

9 38. In reviewing this *Till* factor, the Debtors' expert Rodriguez analyzed such aspects as
10 the location, condition and desirability of the Property, the status of its leases, market conditions and
11 risk markers such as loan-to-value ("LTV") ratio. The Rodriguez Report explains that, while the
12 other factors weigh heavily in favor of the Debtors, the LTV ratio exceeds industry standards and
13 thus warrants a risk adjustment of 1.5%.

14 39. Mr. Ferrell makes an adjustment of 1.65% based on the high LTV and debt coverage
15 ratio. However, he also adds 2.0% solely because the Property is an office building. While Mr.
16 Ferrell attempts to justify making two adjustments for the nature of the security, based on his
17 characterization of the "first mortgage portion" and the "higher risk portion" of the loan, both
18 ultimately consider the same risk factors – LTV and debt service coverage ratio. In fact, in reaching
19 the 200 point adjustment, Mr. Ferrell references a survey which lists office building LTV and DSCR
20 as data points. He does not explain the direct applicability of the survey to his adjustment. The
21 survey includes only one loan with a five year term which lists a 5.0% corresponding interest rate,
22 while the others range from seven to ten years, amortized over 25 to 30 years. In effect, Mr. Ferrell
23 has supplanted the *Till* ruling, substituting his estimate of a non-existent market rate which
24 incorporates risks of non-payment in place of a "riskless rate".

25 **c) Duration Of The Plan**

26 40. The parties also disagree on the adjustment to be provided based on the five-year term
27 of the Plan. However, it is Mr. Rodriguez who assigns an upward adjustment of 0.50% while Mr.

1 Ferrell assigns a 0.60% downward adjustment, noting that the Plan's shorter term reduces the risk of
2 nonpayment.

3 **d) Feasibility Of The Plan**

4 41. The experts agree, although through different reasoning, that the rate should be
5 adjusted 100 basis points upward to account for the potential risk of failing to fulfill the Plan
6 requirements.

7 **2. Comparison Of Proposed Rates**

8 42. When comparing the rates proposed by Mr. Ferrell and Mr. Rodriguez – 8.25% and
9 6.00% respectively - the two are not completely divergent. Both assign a 1.00% upward adjustment
10 for feasibility and both assign approximately 1.50% for a high LTV ratio. The material differences
11 are based on (a) the circumstances of the estate where Mr. Ferrell fails to credit the Debtors'
12 managerial experience, success and unquestioned commitment to the Property (a 1.25%
13 discrepancy) and (b) the nature of the security, where Mr. Ferrell has added on an extra 2.00%
14 adjustment which appears duplicative, unfounded and contrary to applicable law. Furthermore, Mr.
15 Rodriguez assigned a 0.50% upward adjustment based on a general risk for the Plan's term while
16 Ferrell noted that the five-year term decreased risk.

17 43. In any event, it is clear that when all factual circumstances of these Bankruptcy Cases
18 are considered – including the quality and revenue generating capacity of the Property, the Debtors'
19 successes, the near stable, almost completely improved and near capacity buildings – the 6.0%
20 interest rate is appropriate. Indeed, if one eliminates the duplicative adjustment made by Mr. Ferrell
21 simply because of the fact that the Property is an office building, the two reports come to similar
22 ultimate conclusion on the appropriate interest rate.

23 **C. The Plan Is In The Best Interests Of Creditors**

24 44. Section 1129(a)(7) provides that each holder of an impaired claim must either vote in
25 favor of a plan or receive on account of its claim at least the same return that it would get if the case
26 were a liquidation under chapter 7. Here, CIBC is the only dissenting Creditor. Nonetheless, the
27 Plan satisfies the "best interests" test with respect to all classes of Claims, including Class 2, as it

1 provides for the Debtors to reorganize their business operations and to maximize value for all
2 Creditors in the most cost-effective manner. The Debtors may pay Allowed Claims over time so
3 long as interest is paid as compensation for the time value of money. Here, the Plan provides for a
4 payment in full on all Allowed Claims.

5 45. Presumably, CIBC contends that it would receive more in a chapter 7 liquidation
6 because it disputes that the rate of interest it will be paid under the Plan will compensate it for the
7 five-year delay in payment proposed by the Plan. However, the appropriate rate of interest proposed
8 by the Debtors is 6.0%, and such rate will in fact compensate CIBC for the time value of its Allowed
9 Secured Claim.

10 **D. The Plan Complies With The Applicable Provisions Of The Bankruptcy Code**

11 46. As set forth in the Statement and herein, the Plan complies with the applicable
12 provisions of the Bankruptcy Code and satisfies section 1129(a)(1). CIBC's Objection asserts that
13 the Plan modifies the obligations of John and Rosalie Feece under a guaranty to CIBC. This
14 assertion is wrong as the Plan does not provide for any such modification.

15 **VI. CONCLUSION**

16 47. For the foregoing reasons, CIBC's objections should be overruled, and the Plan be
17 confirmed under such terms and conditions as the Court deems appropriate.

18
19 Dated: October 5, 2012

MURRAY & MURRAY
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21 By: /s/ Robert A. Franklin
22 Robert A. Franklin
23 Attorneys for Debtors
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